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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the Illinois Appellate Court, First District, is reported at 91 Ill. App. 2d 212, 234 NE 2d 384 (1968), and is reprinted in Appendix F to this petition. The order denying leave to appeal by the Illinois Supreme Court is not reported.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Is the right to be secure against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution violated by the Illinois Criminal Statute on Resisting or Obstructing a Peace Officer, Ill. Rev. Stat., 1967, ch. 38, §31-1 where:

(a) The statute only proscribes a citizen from knowingly resisting to authorized acts within a peace officer's official capacity and

(b) as such adequately sets forth the standards of conduct for a peace officer as well as a citizen of the United States?

(2) Is the right to the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution violated when a reviewing court makes a statement fairly inferred from the facts in the record and relies on a statute not as the basis for its opinion but as mere dictum?

STATEMENT

On June 24, 1966, one Ruby Jones filed a complaint alleging that Jeff Fort (and Eugene Hairston) obtained unauthorized control over her property, to wit: a 20-guage J. C. Higgins Shotgun, intending to deprive her of the use or benefit of said property in violation of Ill. Rev. Stats., 1967, ch. 38, §16-1 (theft) (See Appendix E.).

On the above date one John Sullivan, a police officer, was called to assist in the investigation of the theft which had taken place at 1422 East 67th St., Chicago, Ill. (Rep. of Pro. 6).

After a conversation with the complainant the officer toured the immediate area, and at 1404 East Marquette

Road the officer saw a group of young men sitting on a porch. (Rep. of Pro. 6). Gene Hairston (who lived at this address—Rep. of Pro. 12), alighted from the porch and asked Officer Sullivan and Officer Kovacs, "What's wrong?" To which Officer Sullivan replied that "he has a charge that you were involved in a theft" (Rep. of Pro. 7). The officer went on to say where the theft took place and that it was the theft of a shotgun (Rep. of Pro. 7).

The officers then requested that the rest of Hairston's friends (one of whom was the defendant Jeff Fort) come down from the porch, which they did (Rep. of Pro. 7). The officer, recognizing defendant Fort on sight, explained to him that they were given their names with reference to the theft and were in the process of investigating the theft. (Rep. of Pro. 8).

At this time Officer Sullivan called for the other squad that was also involved in the investigation and the complainant was brought to the scene (Rep. of Pro. 8). Immediately after certain statements were made by this citizen the officer proceeded up the stairs to the porch where the five young men (Hairston, Fort and 3 others) had been and he recovered a shotgun (Rep. of Pro. 8). Bringing the shotgun back downstairs with him he announced that Fort, Hairston and three others were all under arrest (Rep. of Pro. 8), as did Officer Kovacs (Rep. of Pro. 19). Immediately Jeff Fort said "Bullshit" (Rep. of Pro. 8). The officer commenced to take Fort into custody and Fort pushed him and hit him in the face and shoulder, two of the other young men tried to come on the arresting officer from behind (Rep. of Pro. 8).

Officer Kovacs testified that the four men were milling around and it seemed that they were trying to take Jeff Fort away from the custody of the officers (Rep. of Pro.

16). Officer Kovacs was struck from behind (Rep. of Pro. 12), and he described the situation as one of disorder (Rep. of Pro. 19).

Jeff Fort after swinging, thrashing, kicking and swinging his arms was finally subdued with the assistance of Officer Kovacs and the other two officers on the scene (Rep. of Pro. 8 and 20).

Jeff Fort testified that Officer Sullivan asked him where the shotgun was (Rep. of Pro. 22). Fort denied any knowledge of a shotgun (Rep. of Pro. 22).

On cross-examination, when Fort was asked if the officer had told him that he was under arrest, Fort replied, "He said you are all going to jail" (Rep. of Pro. 23). When asked further if by this did you think you were under arrest at that time, Fort replied, "When I saw that there wasn't nothing I could do but do what he said—I went with them." (Rep. of Pro. 23).

The theft charge against Jeff Fort was dismissed for want of prosecution, no complaining witness (Rep. of Pro. 4).

ARGUMENT

I.

THE ILLINOIS CRIMINAL STATUTE ON RESISTING OR OBSTRUCTING A PEACE OFFICER, ILL. REV. STATS. 1967, CH. 38, §31-1 DOES NOT IN ANY MANNER VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

The Statute Only Proscribes A Citizen From Knowingly Resisting To Authorized Acts Within A Peace Officer's Official Capacity.

Ill. Rev. Stats., 1967, ch 38, §31-1 is as follows:

> 31-1. § 31-1. Resisting or Obstructing a Peace Officer.] A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Respondent respectfully directs this Honorable Court's attention to the case of Landry v. Daley, 280 F. Supp. 938 (1968). In this case the United States District Court, sitting as a three-judge federal district court upheld the constitutionality of Ill. Rev. Stats., 1967, ch. 38, §31-1; Resisting or Obstructing a Peace Officer.

A portion of that opinion which can be found at pages 959 and 960 is as follows:

> *The Resisting or Obstructing a Peace Officer Statute*
> Plaintiffs also contend that the Illinois "Resisting Arrest" statute, Ill. Rev. Stat., ch. 38, § 31-1, is void

both for reasons of vagueness and overbreadth. It provides:

> A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than a penitentiary not to exceed one year, or both.

This statute has likewise not been construed by the Illinois Courts. We must, therefore, again place our own construction upon it, giving the words their reasonable and natural construction.

[31, 32] This statute is designed to deter a person from resisting or interfering with the acts of law enforcement officials, simply on the basis of the person's own conclusion as to the impropriety of the act. It thus furthers the legitimate state interest in protecting peace officers, preventing frustration of the valid enforcement of the law, and promoting orderly and peaceful resolution of disputes.[77] It is obvious, therefore, that this statute is not directed at peaceful assembly. Its enforcement, at times, may conflict with assembly, but in such instances, the public interest in discouraging violence and insisting upon the use of peaceful methods of obtaining redress from unlawful acts outweighs the recognition of the feelings of the demonstrators.[78]

[33] The gist of the offense is "resisting" or "obstructing" the valid acts of a peace officer. These terms convey commonly recognized meanings. "Resisting" or "resistance" means "withstanding the force or effect of" or the "exertion of oneself to counteract

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77. Cf. Warner, The Uniform Arrest Act, 28 Va.L.Rev. 316 (1942).

78. Cf. Warner, supra note 77 at 330-31.

or defeat".[79] "Obstruct" means "to be or come in the way of."[80] These terms are alike in that they imply some physical act or exertion. Given a reasonable and natural construction, these terms do not proscribe mere argument with a policeman about the validity of an arrest or other police action, but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent, or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically aiding a third party to avoid arrest.[81]

[34, 35] The statute further requires that the person resists or obstructs "knowingly" and that the officer be in the performance of an "authorized act within his official capacity." The term "knowingly" is specifically defined in the Criminal Code.[82] It considerably narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription. The term "authorized act," although not specifically defined in the Code, is not to obscure that men of common intelligence would differ as to its import. "Authorize" is defined as "to endow with authority or effective legal power, warrant, or right."[83] In the context of the statute the phrase "authorized act," given a reasonable and natural construction,

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79. Webster, New International Dictionary n. 1 & 2 (3d ed. 1964 Unabridged).

80. Webster, New International Dictionary n. 2 (3d ed. 1964 Unabridged).

81. Cf. In Re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322, 333 (1st Dist. 1966).

82. See note 72 supra.

83. Webster, New International Dictionary n. 4 (3d ed. 1964 Unabridged).

means the legal or legally effective acts of an officer.[84] This phrase thus narrows the scope of the offense still further to include only resistance or obstruction of the legal acts of police and other officers.[85] For instance, resistance to an illegal search and seizure would not be proscribed.

[36] Nevertheless, plaintiffs contend that the statute permits police to exercise wholly arbitrary and capricious discretion in regard to group assemblies. Under the language of this statute, they argue, a peace officer need only decree on the spot that the most peaceful assembly be broken up and any failure on the part of a citizen to comply with such an order subjects him to the penalties of this statute. They contend that the *in terrorem* effect on the right of peaceful assembly arising from the potential misapplication of this statute requires, therefore, that it be declared unconstitutional.

This argument is unpersuasive for two reasons. First, the plaintiffs have not given the statute a reasonable construction. It does not proscribe resisting

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84. Cf. Ill. Rev. Stat. Ann. ch 38, § 31-1 (Smith-Hurd 1964) (Committee Comments). An analogous United States statute describing "Assault on a Process Server," 18 U.S.C. § 1501, has been similarly construed to prohibit only resistance or obstruction of a law officer while in the performance of a legally effective act. See, e. g., Sparks v. United States, 90 F. 2d 61 (6th Cir. 1937); Briggs v. United States, 24 F. 2d 961 (9th Cir. 1924).

85. There is an exception to this rule in another section of the Illinois Criminal Code. If the act which is resisted or obstructed is the making of an arrest, a private person is not authorized to resist such arrest with force even though he knows the arrest is unlawful. See Ill. Rev. Stat. ch. 38, § 7-7 (1967). See, also, Ill. Rev. Stat. Ann. ch 38, § 31-1 (Smith-Hurd 1964) (Smith-Hurd 1964) (Committee Comments).

or obstructing an unlawful act of a peace officer. The guilt or innocence of the defendant specifically depends on the validity of the officer's act. Therefore, if a policeman erroneously, capriciously, or arbitrarily orders peaceful demonstrators to disperse, acts of resistance or obstruction by the demonstrators would not subject them to criminal liability under this provision.

[37-39] Second, the basis of plaintiffs' argument is not the scope of the enactment, but its possible misapplication. The constitutionality of a statute, however, is not dependent on its susceptibility of misapplication. For every statute is susceptible of abuse, misuse of misapplication. Rather, its validity depends on whether the language of the statute, given its normal meaning, is so broad that it intrudes upon Constitutional rights.[86] If the language is so broad that its sanctions may be applied indiscriminately to constitutionally protected conduct, as well as to conduct which may properly be proscribed, it violates substantive due process and, therefore, is unconstitutional.

[40] The instant statute, however, does not contain such overreaching language. While admittedly, like any statute, it may be misapplied, its sanctions apply only to knowing physical resistance or obstruction of a valid act of a peace officer. These sanctions, therefore, do not ultimately depend on the subjective views of those charged with its enforcement. Consequently, we conclude that it is neither vague nor overbroad.

Petitioner attempts to construe the Illinois Statute on Resisting or Obstructing a Peace Officer under which he was properly convicted, in a manner inconsistent with the reasonable and natural construction of the words.

The Statute expressly provides through the use of the words resist and obstruct that a physical act or execution

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86. See authorities cited notes 41-43, supra and accompanying text.

is necessary. It was not the one foul and vulgar word which the defendant uttered which held him open for conviction under this Statute. It was that which followed, the pushing and hitting of the police (peace) officer (Rep. of Pro. 8).

The Statute further provides that the peace officer must be carrying out an authorized act within his official capacity. These words were more than adequately described and defined by the three-judge district court, sitting in the Landry case (supra).

Petitioner contends that defendant's acts of pushing and hitting the police officer were "justified" in view of the "unreasonableness" of the arrest and subsequent force used by the officer.

But who is best qualified to determine what is justified and what is unreasonable? Should it have been Jeff Fort that evening at 1404 East Marquette Road, Chicago, Illinois? Isn't it within the public's interest that the determination of what is justified and what is unreasonable be left to the courts of our land in a civilized manner?

The United States Constitution gives each citizen the right to bear arms, but does this prohibit the legislative branch of our government from enacting laws to control their use?

The United States Constitution grants freedom of speech. But does this entitle a citizen to "yell fire in a crowded theatre?"

Although petitioner questions only the constitutionality of §31-1, upon which his conviction was based, three corollary statutes are involved—Ill. Rev. Stats., 1967, ch. 38, §7-5, §7-7, and §107-2(c).

The officer in the case at bar received certain information from one Ruby L. Jones.[1] With this information the officer proceeded to tour the area in question, and at 1404 E. Marquette Road[2] saw Jeff Fort along with four other men sitting on a porch (Rep. of Pro. 6). The officer stopped his squad car and one man alighted from the porch and asked, "What's wrong?" (Rep. of Pro. 6). The officer stated, "We have a charge that you were involved in a theft" (Rep. of Pro. 7). The officer then told him where the theft took place and that it was a theft of a shotgun (Rep. of Pro. 7). At this time the officer told the rest of the men to come downstairs from the second floor (one of whom was Jeff Fort) (Rep. of Pro. 7). The officer told them that he had been given the names of Fort and Hairston and that he was in the process of investigation (Rep. of Pro. 8). After the complainant was brought over to where the officers were, Officer Sullivan proceeded up the stairs to where the five men had been (Rep. of Pro. 8). The officer finding a shotgun on the porch where the men had been a few seconds earlier came back downstairs and announced that "they were all under arrest" (Rep. of Pro. 8). Officer Sullivan went on to say that at this time Mr. Fort said, "Bullshit", and I grabbed him, and he pushed me and hit me and Officer Kovacs told me that two persons tried to come on me from behind (Rep. of Pro. 8).

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1. Ruby L. Jones on June 24, 1966, filed a complaint against Jeff Fort (Ind. No. 377629) for the theft of a shotgun from a store at 1422 E. 67th St., Chicago, Ill. The charge was thereafter dismissed for want of prosecution on January 10, 1967 because the complaining witness could not be found. (See Appendix E).

2. The distance between 1422 East 67th Street and 1404 E. Marquette Road is approximately one city block.

Officer Kovacs testified, "that after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him. With the milling of the other five gentlemen, it seemed to me that they were trying to take Jeff Fort away from our custody" (Rep. of Pro. 16).

On redirect, Officer Kovacs testified that he saw Jeff Fort swinging, and thrashing, kicking, swing his arms, when Officer [Sullivan] tried to handcuff him. Thus, under these circumstances two questions are raised, first, whether or not Officer Sullivan had reasonable grounds to believe that the five men had committed an offense, in which case he would be justified in placing all five men under arrest pursuant to Ill. Rev. Stats., 1967, ch. 38, §107-2(c), and second, whether or not it was reasonable for Officer Sullivan to grab hold of Jeff Fort?

Ill. Rev. Stats., 1967, ch. 38, §107-2(c) is as follows:

> § 107-2. Arrest by Peace Officer
>
> A peace officer may arrest a person when:
>
> (a) He has a warrant commanding that such person be arrested; or
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> (b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or
>
> (c) He has reasonable grounds to believe that the person is committing or has committed an offense. 1963, Aug. 14, Laws 1963, p. 2836, § 107-2.

Since the decision in United States v. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653, it has become an established principle that the premises where an arrest is validly made, under the control of the person arrested, are subject to search without a search warrant, and that

such search is not unreasonable within the prohibition of the United States Constitution.

An arrest without a warrant, such as occurred in this case, is lawful if a criminal offense has in fact been committed and the arresting officers has reasonable grounds for believing that the person to be arrested has committed it. Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327; People v. Fiorito, 19 Ill. 2d 246, 166 NE 2d 606; People v. LaBostrie, 14 Ill. 2d 617, 153 NE 2d 570.

The test is not whether there is sufficient evidence to convict the arrested man, but probable cause exists for arrest where a reasonable and prudent man having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense. People v. LaBostrie, 14 Ill. 2d 617, 153 NE 2d 570; People v. McGowan, 415 Ill. 375, 114 NE 2d 407.

Furthermore, it cannot be said that an officer who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful. Heliczer v. United States, 373 F. 2d 241, 245, cert. den. 87 S. Ct. 2133, 388 U.S. 917; United States v. Montanais, 362 F. 2d 527, 528.

See also Hodgdon v. United States, 365 F. 2d 679, cert. den., 87 S. Ct. 759, 385 U.S. 1029 where it was said that no one is entitled to resist with deadly force a U. S. Marshall operating under color of authority, even though it is later found that no actual authority existed. Therefore, under the circumstances thus described and with the knowledge Officer Sullivan thus possessed at the moment he announced the arrest of the five men, it can be said that Officer Sullivan had reasonable grounds to believe that the persons had committed an offense and that his arrests of these persons were lawful.

The second Statute previously mentioned is Ill. Rev. Stats., 1967, ch. 38, §7-5, which was presented to the Ill. App. Court in the State's Brief, is as follows:

§ 7-5. Peace Officer's Use of Force in Making Arrest

(a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid. 1961, July 28, Laws 1961, p. 1983, §7-5.

The Statute expressly allows a police officer to use any force which he reasonably believes to be necessary to effect the arrest . . . and he need not retreat or desist from efforts

to make a lawful arrest because of resistance or threatened resistance to the arrest.

The second question then raised is whether it was reasonable for Officer Sullivan to grab hold of Jeff Fort. Can it be said that there was a threatened resistance when Jeff Fort answered Officer Sullivan's anouncement of arrest by saying "Bullshit?" Cn it be said that under the circumstances of a milling crowd of four other men and who another officer said "appeared to be trying to take Jeff Fort away from custody", that Officer Sullivan's act in grabbing Jeff Fort was unjustified?

The State unquestionably declares that the circumstances were such that a reasonable man could believe that a threatened resistance was being contemplated and that Officer Sullivan's act in grabbing the defendant was justified.

The third Statute previousy mentioned as a corollary to §31-1, namely §7-7 is as follows:

> §7-7. Private Person's Use of Force in Resisting Arrest
>
> (a) A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful. 1961, July 28, Laws 1961, p. 1983, §7-7.

Respondent respectfully directs this Honorable Court to the comments which follow the Statute in Smith-Hurd Anotated Statutes, 1967, and which are set forth as follows:

Committee Comments

Revised by Charles H. Bowman

Section 7—7 states a corollary to the justification acorded to an officer or deputy in using force to make an arrest, even if the arrest, without his knowledge, is unlawful: the person arrested is not privileged to resist the arrest with force. This provision is a deterrent to the resort to force by such a person, upon his own conclusion that the arrest is unlawful, in preference to the use of the methods provided by law for obtaining his release and redress for the unlawful arrest. (An extreme illustration of such resort to force appears in People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926).) Such resort to force only invites the officer to use greater force to acomplish the arrest, which he believes to be lawful,—and the officer usually is the better prepared to use force. The public interest in discouraging violance and insisting upon the use of peaceable methods of obtaining release from unlawful arrest clearly outweighs the recognition of the feeling of the individual. (This was the view of the Uniform Arrest Act, § 6: see Warner, "The Uniform Arrest Act," 28 Va.L.Rev. 316 at 330, 331 (1942)).) While the rule as to resisting unlawful arrest usually is stated otherwise—for example, "to constitute the offense of resisting an officer, it must be shown that the process is legal," (See 1 Wharton's Criminal Law (12th ed.). § 853; Waite, "Some Inadequacies in the Law of Arrest," 29 Mich.L.Rev. 448 at 466 to 468 (1931); 3 ILP, "Assault and Battery," § 44; Wentworth v. People, 5 Ill. 550 (1843)—"It seems to be conceded, that if an officer, by virtue of a process against one person, offers to take into custody another, he may be resisted, and that the officer alone will be responsible." See also People v. Smith, 315 Ill. App. 671, 43 N.E. 2d 420 (1942).) The Supreme Court of Nebraska at one time suggested that an illegal arrest might be resisted, even to killing the arrestor: Simmerman v. State, 14 Neb. 568, 17 N.W. 115 (1883), commented

on in Note, 33 Neb.L.Rev. 451 at 453 (1954). A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.) §§ 542 and 853; 1 Bishop on Criminal Law (9th ed.), § 868, and 1 Bishop's New Criminal Procedure (2d ed.), § 162; People v. Doody, 34 Ill. 194, 175 N.E. 436 (1931); People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926); Rafferty v. People, 69 Ill. 111 (1873) and 72 Ill. 37 (1874); People v. White, 33 Ill. 512, 165 N.E. 168 (1929); also People v. Brown, 288 Ill. 489, 123 N.E. 515 (1919), and People v. Smith, (1919), supra. Malice was found in People v. Davis, 412 Ill. 391, 107 N.E. 2d 607 (1952)—murder; and People v. Osborne, 278 Ill. 104, 115 N.E. 890 (1917)—assault with intent to murder.)

The provision applies only to the situation in which the alleged offender knows that the arrestor is a peace officer or private person summoned and directed to make the arrest (see People v. Lavac, 357 Ill. 554, 192 N.E. 568 (1934), in which the defendant, in his dwelling, fired through a closed door and killed two policemen in plain clothes, mistaking them for "hoodlums"; also People v. Doody, and People v. Brown, supra; and People v. Bissett, 246 Ill. 516, 92 N.E. 949 (1910). In People v. Davis, 412 Ill. 391, 107 N.E. 2d 607 (1952), the offender recognized the plain clothes policemen by their car. See 2 Bishop on Criminal Law (9th ed.), § 654, on the question of notice of official character), and it does not apply to the situation in which the officer uses excessive force: whether the arrest is lawful or unlawful, the officer's use of excessive force invokes the right of self-defense stated in section 7—1. (See People v. Doody and People v. Smith, supra.) The penalty for the offense of resisting arrest will be found in section 1—7(j) of this Code.

The Statute expressly forbids an individual from resisting an arrest by force even if he believes that the arrest is unlawful and the arrest in fact is unlawful. Again, this Statute is in furtherance of a peaceful solution to what a person may believe to be an unlawful arrest. The preference to the use of methods provided by law for obtaining release and redress for an unlawful arrest far outweighs the dangers which may be brought about by a self-interest, self-determination, spur of the moment decision, by an individual that an arrest is unlawful. Note Hodgdon v. United States (supra).

Petitioner alleges that a reasonable effort to determine the ownership of the gun should have been made (Appellant's Br. p. 14). Although the record does not yield much light on what efforts the police did take in trying to determine the ownership of the gun. It can fairly be said that the police officer did call for the other car investigating the incident which brought the complainant to the scene and that it wasn't until after certain statements were made by this citizen that Officer Sullivan proceeded to the porch where the men were standing and found the shotgun (Rep. of Pro. 8). It would appear that the officers did in fact make a reasonable effort before he proceeded further with his investigation and the subsequent arrests to determine the participants of the crime.

In summation, respondent has shown, (1) the constitutionality of Ill. Rev. Stats., 1967, ch. 38, §31-1 which defendant was found guilty of violating; (2) that the police officer's actions with the knowledge he possessed and the surrounding circumstances at the time of arrest were unquestionably appropriate; (3) that because the officer's acts were appropriate and the arrest legal, defendant could not lawfully resist, (4) that the defendant cannot be al-

lowed to be the judge in the determination of when an arrest is unlawful and when and to what extent he is allowed to use force in resisting this self-determined "unlawful arrest." (5) that under any circumstance, Ill. Rev. Stats., 1967, ch. 38, §31-1 is designed to deter a person from resisting or interfering with the acts of law enforcement officials, simply on the basis of the person's own conclusion as to the impropriety of the act. It thus furthers the legitimate state interest in protecting peace officers, preventing frustration of the valid enforcement of the law, and promoting orderly and peaceful resolutions of disputes (Landry v. Daley, 208 F. Supp. 938 (1968)).

B.

The Standards Set Forth In Ill. Rev. Stats., 1967, ch. 38, §31-1 are Neither Vague Nor Do They Proscribe Conduct Protected by The Fourth Amendment To The United States Constitution.

Petitioner's attempts to construe §31-1 as being unconstitutional, solely on the basis of the actions of the trial judge and petitioner's interpretation of the Illinois Appellate Court's decision.

Respondent has already pointed out the decision and interpretation of §31-1 by the District Court, sitting as a three-judge federal district court in the case of Landry v. Daley, 280 F. Supp. 938 (1968). That court upon full review of the Statute held that §31-1 was neither vague nor overbroad. Respondent can add nothing to that court's clear, reasonable and natural construction of the words in §31-1. As the Court in the Landry case held, the Statute does not proscribe to resistance to an illegal search and seizure, nor does it proscribe to resistance to

a policeman's erroneous, capricious or arbitrary orders (280 F. Supp. 938, 960).

Petitioner also mentions Ill. Rev. Stats., 1967, ch. 38, §7-5(9) and §7-7(a)[3], neither of which was defendant found in violation of. His conviction was based solely on violation of §31-1. The question therefore arises whether petitioner has grounds to question the constitutionality of either section? Furthermore, it is questionable whether petitioner even attempts to question their constitutionality since he speaks only of the Illinois Resisting Statute (§31-1) as being vague and in violation of the Fourth Amendment (Deft's. Br. p. 15).

The State will nevertheless state that both sections are constitutional for reasons previously mentioned.

Most of petitioner-defendant's allegations here have already been discussed. However, petitioner does make one allegation in his brief at this point, which although having nothing to do with the constitutionality of §31-1, is raised, and will be discussed by the State at this point. The allegation thus presented is to be found in defendant's brief on p. 15, namely, "that the Illinois Appellate Court found it necessary to expand §31-1 to include two other statutes, §7-5(a) and §7-7."

Ill. Rev. Stats., 1967, ch. 38, §7-5(a) was properly introduced by the State in its brief on appeal (See Appendix A) and was therefore properly incorporated in the decision by the Illinois Appellate Court. Since §31-1

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3. Neither of these sections are a nullity under Illinois law since the penalty for violation of these sections can be found in Ill. Rev. Stats., ch. 38, §1-7(j). Furthermore, the case of People v. Graf, 93 Ill. App. 2d 43, which petitioner cites, a dram shop case, is not on point.

proscribes resistance to the authorized acts of a peace officer it was necessary to determine if the grabbing of Jeff Fort by Officer Sullivan was a reasonable exercise of force and, therefore, an authorized act. To determine this it was necessary for the Illinois Appellate Court to look to §7-5 which had been properly presented to it on review in the State's brief. Therefore, the State does not understand what petitioner means when he says the "Appellate Court found it necessary to expand §31-1 to include §7-5." Since it was proper for the Illinois Appellate Court to refer to said section.

Ill. Rev. Stats., 1967, ch. 38, §7-7(a) was never made the basis of the decision by the Illinois Appellate Court. In passing the Court said:

> "Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, ch. 38, §7-7, Ill. Rev. Stats., (1965)). Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed."

The Appellate Court by reciting what is merely obiter dictum has done nothing to "expand" §31-1 as petitioner would have us believe.

Furthermore, since respondent has previously shown that the defendant knowingly resisted a lawful arrest, the performance of an authorized act, it would make it unnecessary to decide the constitutionality of §7-7. People v. Michael Birnbaum, —— Ill. 2d ——, No. 41324, 11/68 (Appendix D).

Finally, it is essential to the jurisdiction of the Supreme Court under 28 United States Code Section 1257 that a substantial federal question has been properly

raised in the state court proceedings. (Note the constitutionality of §31-1, §7-7 or §7-5 was never raised by petitioner in either his brief filed in the Illinois Appellate Court or in his petition for leave to appeal to the Illinois Supreme Court (See Appendx B & C).). This federal question must be more than a formal one. Since the issue as to the constitutionality of any of these statutes was never raised in the state court proceedings, it is not considered a substantial or proper basis for the granting of the petition. Zucht v. King. 260 U.S. 174.

II.

A CITIZEN OF THE UNITED STATES IS NOT DENIED THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT, WHEN A REVIEWING COURT MAKES A STATEMENT FAIRLY INFERRED FROM THE FACTS IN THE RECORD AND RELIES ON A STATUTE NOT AS THE BASIS FOR ITS OPINION BUT AS MERE DICTUM.

Petitioner sets forth five allegations in his second question presented to this honorable court, some of which the State has already answered.

Petitioner's first allegation "that the Appellate Court's assumption that the shotgun was stolen was unfounded and thus eliminated the need to determine if the arrest was legal," is without merit.

Respondent has already discussed the merits of the arrest made by Officer Sullivan and will not reiterate those facts at this time. However, the State will discuss briefly the "assumption" by the Appellate Court that the shotgun was stolen.

On June 29, 1966, Officer Sullivan was investigating the theft of a shotgun by Jeff Fort (See Appendix E). A shotgun was found in the immediate presence of where Jeff Fort had been sitting a few seconds earlier. All of this taking place with the owner of the shotgun being present at the scene where the shotgun and Jeff Fort were found. It would be a reasonable assumption that the shotgun found was that claimed to be stolen by Ruby Jones earlier that evening. This is especially true in view of Jeff Fort denying knowledge of the existence of a shotgun (Rep. of Pro. 22) which was found by the officer on the porch where Fort had been a few seconds earlier.

Nevertheless, in view of the fact that the arrest as previously described was legal, and in view of the fact that defendant was found guilty of resisting arrest and not of the theft of a shotgun, the statement by the Illinois Appellate Court in describing the shotgun as "stolen" was mere harmless error. When all of the above is contemplated it can readily be seen to be harmless error beyond a reasonable doubt. Chapman v. California, 386 U. S. 18 (1967).

Petitioner's second allegation that the statement by the Illinois Appellate Court in stating "that the arrest occurred in a tense situation was unfounded in that there was no evidence of tension in the record", is also without merit.

What better word could best describe a situation after Officer Sullivan announced that he was investigating the theft of a shotgun and that the complainant accused Fort and Hairston of the crime (Rep. of Pro. 7, 8), the finding of a shotgun on a porch where the five "boys" had been sitting a few seconds earlier, the statement by Jeff Fort of "Bullshit" in answer to the announcement of arrest

(Rep. of Pro. 8), the milling around of these five "boys" in what appeared to be an attempt to take Jeff Fort from custody (Rep. of Pro. 16), and finally, as one officer put it, a situation of disorder (Rep. of Pro. 19).

Our courts are not limited in using only those words which have been spoken during the course of trial in giving their opinion. Fair and reasonable inferences can be drawn from that which has been said and such is the case here. The word "tense" is a fair summation of the events which took place prior to, and at the time Officer Sullivan "grabbed" Jeff Fort.

Petitioner's third allegation can best be answered by a referral to Webster's Third New International Dictionery, unabridged, 1964 as well as to the surrounding circumstances just described in which the word "Bullshit" was uttered. That word under these circumstances has but one meaning, a contemptuous and defiant connotation.

Petitioner's fourth allegation is indeed interesting. Petitioner, on page 18, 19 of his brief states that,

> "Four armed policemen were trying to arrest five unarmed boys, ordinarily, this is a very favorable situation for the policemen and nothing in the record changes the ordinary."

On page 22 of petitioner's brief he states:

> "Moreover, the Illinois Courts stated that four officers were required to restore order. Again a material mistatement of fact designed to show more trouble than there really was. The record is very clear that two of the officers remained away from the struggle.

"In one instance petitioner denotes four armed policemen were trying to make an arrest and in other instances

denotes that two of the four officers remained away from the struggle."

The only evidence in the record as to the extent of participation by the other two officers in this arrest and the subsequent events can be found on pages 9 and 17. (Rep. of Pro. 9):

> "Q. Were you able to place him [Fort] under arrest?
>
> "A. [Officer Sullivan] Yes, with the assistance of Officer Kovacs and two officers on the scene" (Rep. of Pro. 9).

And on page 17:

> Q. You were going to handcuff him to subdue him. All right.
>
> A. (Officer Kovacs) Then I struck from—it seemed like from behind, a glancing blow or a bump up against me. I turned around, and Eugene Hairston was there, and I took hold of him also and thus asking for a pair of handcuffs from one of the other officers at the scene to handcuff him. (Rep. of Pro. 17).

Thus, it can be readily observed that there is no evidence that four armed policemen were trying to arrest five "unarmed" boys (Deft's Br. p. 18), but that there was evidence that four officers were required to restore order as the Illinois Appellate Court so stated in its opinion.

Furthermore, petitioner alleges that "the record is quite ambiguous and contradictory as to when, what, and how much struggling ensued" (Deft.'s Br. p. 21). He then goes on to say, "A reasonable interpretation is that defendant was protecting himself from an angry police officer. . . ." (Deft's. Br. p. 21).

Not only is the record clear as to the struggling that ensued but the record is equally clear that there is no evidence that there existed an "angry" police officer from whom the defendant was "protecting" himself.

There was no erroneous and improperly misstated facts by the Illinois Reviewing Court.

Petitioner's fifth and final allegation has already been discussed and will not again be reiterated.

Finally, as has been previously mentioned, since the issues that have heretofore been raised were never raised in the state court proceedings (Note especially, Petition for Leave to Appeal (Appendix C)), it is not considered a substantial or proper basis for the granting of the petition, Zucht v. King. 260 U.S. 174.

CONCLUSION

Respondent respectfully requests that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

APPELLATE COURT OF ILLINOIS
First District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division. Honorable Harry G. Comerford, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

PEOPLE'S THEORIES

The defendant was proven guilty of resisting arrest beyond a reasonable doubt because of misconduct against police officers while such officers were investigating a theft.

POINTS AND AUTHORITIES

I.

THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT THE FINDING OF GUILTY BY THE TRIAL COURT WHICH, BEING THE TRIER OF THE FACTS, HAD THE DUTY TO DETERMINE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE TESTIMONY.

People v. Williams, 69 Ill. App. 2d 71;
People v. Mack, 25 Ill. 2d 416;
People v. Reaves, 24 Ill. 2d 380;
People v. Thomas, 18 Ill. 2d 439.

II.

THE DEFENDANT WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Ill. Rev. Stat. Chap. 38, Sec. 12-3;
Ill. Rev. Stat. 1963, ch. 38, Sec. 7-5 (a);
People v. Lees, 60 Ill. App. 2d 254.

STATEMENT OF FACTS

On June 24, 1966, Officers Sullivan and Kovacs were assigned to investigate the theft of a shotgun from 1422 E. 67th Street. After speaking with the victim of the theft they toured the area in their police car looking for two men, Hairston and Fort. At 1404 E. Marquette Road, they saw a group of boys sitting on the porch of a building at that address. The officers stopped their car in front of the building and were met by Gene Hairston. They informed him that they had a charge against him alleging

that he was involved in a theft. Officer Sullivan, at this time told the other men on the porch to come downstairs. When they did, he informed them that they were investigating a theft. After calling for the original police car assigned to investigate this matter he went upstairs to where the five young men had been and found the stolen shotgun. When he came downstairs, he informed all five men that "you are under arrest." (Rec. 5, 6, 7, 8). Immediately, Jeff Fort, the defendant, said, "Bullshit", manifesting every intention and inclination to resist the arrest, necessitating Officer Sullivan to grab the defendant, reasonably believing such action was a requisite in view of his being surrounded by five men.

Officer Kovacs testified that it seemed to him as if they were trying to take Jeff Fort from their custody, in view of the milling around of the five defendants (Rec. 16). He further testified that when Officer Sullivan grabbed the defendant, that the defendant pushed and struck Officer Sullivan. Officer Kovacs stated that he saw the defendant swinging and thrashing, kicking, swinging his arms, and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers at the scene who had previously been summoned (Rec. 15, 16, 17, 20).

Trial court dismissed charges against the four other boys but found defendant guilty of resisting arrest and sentenced him to serve thirty days in the house of correction.

ARGUMENT

I.

THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT THE FINDING OF GUILTY BY THE TRIAL COURT WHICH, BEING THE TRIER OF THE FACTS, HAD THE DUTY TO DETERMINE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE TESTIMONY.

The trial judge in this case was correct in believing Officer Sullivan and Officer Kovacs and disbelieving the defendant and he was performing his duty in making his decision, People v. Williams, 69 Ill. App. 2d 71 (No. 50907, p. 7); People v. Mack, 25 Ill. 2d 416, 422; People v. Reaves, 24 Ill. 2d 380, 382. Justice House in People v. Reaves at page 382 said:

> "It is the duty of the court in a bench trial to determine the credibility of the witnesses and the weight to be given to their testimony and unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of defendant's guilt, the finding of the court will not be disturbed".

In the case at bar, counsel claims that the State's witness, Officer Sullivan's testimony is conflicting, and that the trial court erroneously selected and relied on one version of Sullivan's testimony without independent corroboration. He further claims that this action on the part of the Court was mere speculation, and therefore the Court should have disregarded Sullivan's testimony.

On page 8 of the record, Officer Sullivan was asked what he did after he recovered the shotgun. He testified that he came downstairs and stated to the men that they were under arrest. He further testified, "At this time Mr. Fort stated, "Bullshit", and I grabbed him, and he pushed me and hit me, and Officer Kovacs told me that two persons tried to come on me from behind." Officer Kovacs corroborated the testimony of Officer Sullivan when he testified on page 16, in the record that, "When the struggle ensued after Officer Sullivan took hold of Jeff Fort, I came to his assistance and for our protection I attempted to put handcuffs on Jeff Fort to restrain him. With the milling of the other 4 gentlemen, it seemed to me that they were trying to take Jeff Fort away from our custody."

However, counsel for defendant claims that Sullivan's testimony is contradicted because on page 13 of the record, Sullivan testified that Fort uttered certain words, swung at him and tried to move away when Sullivan tried to place him under arrest (Rec. 13). In addition, counsel also points out that Sullivan testified that the defendants were arrested on the porch, but later, on direct examination, testified about telling the defendants on the sidewalk that they were under arrest (Rec. 6, 8). Counsel further states that Sullivan did not attempt to explain or reconcile either of these discrepancies.

With regard to the question of where the men were arrested there is no discrepancy at all. It is clear, from the record, that the men were on the porch and called downstairs by Officer Sullivan and that after finding the shotgun on the porch, he informed all five men while they were downstairs on the sidewalk that they were under arrest.

Although defense counsel contends there is a discrepancy in the testimony of Officer Sullivan it is not suf-

ficient to warrant the court disregarding all of Sullivan's testimony as counsel proffers. Justice Schafer said in People v. Thomas, 18 Ill. 2d 439, 442, with reference to discrepancies in the testimony of witnesses:

> "It is for the trial court to weigh these variances in the light of all of the other testimony; they are by no means of such significance that he was required to hold the defendant's guilt was not proved beyond a reasonable doubt."

Courts of review have consistently recognized that the question of the weight of the evidence is for the trier of the facts who hears and sees the witness and is therefore in a better position to determine which witnesses are worthy of belief than is a court of review solely on the examination of the record. People v. Williams, 69 Ill. App. 2d 71; People v. Mack, 25 Ill. 2d 416.

Defense counsel's rule of rejecting contradictory testimony as cited in Grand Trunk R. Co. v. Hostein, 67 F. 2d 780; Johnston v. Cincinnati N. O. & T. P. Ry. Co., 240 S.W. 429, 436; Pritt v. Terminal R.R. Ass'n., 224 S.W. 2d 119, is clearly not applicable herein because they are civil cases and of no value with reference to the issue of credibility and weight of testimony.

II.

THE DEFENDANT WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

A person is guilty of resisting arrest when he knowingly resists or obstructs a peace officer in the performance of an authorized act. (Ill. Rev. Stat. Chap. 38, Sec. 31-1). Here, the evidence showed that the defendant, Jeff Fort, was "swinging and thrashing, kicking, swinging his arms,"

when Officers Sullivan and Kovacs tried to handcuff the defendant and restrain him. Defense contends that Officer Sullivan was not justified in grabbing the defendant to effect an arrest and that the defendant's pushing the officer and striking him was within the defendant's rights in order to protect himself.

The defense misconceives the law. The offense of resisting is proved by evidence which shows act of resistance. These resistive acts need not be successful in order to prove the crime. The testimony of the two officers was reasonable, and was believed by the trial judge who had an opportunity to observe the demeanor of the witnesses.

In the instant case, Officers Sullivan and Kovacs were investigating the theft of a shotgun. When they saw the five boys sitting on the porch at 1404 E. Marquette Road, they stopped their car to investigate. They had been given the names of Fort and Hairston by a citizen and after explaining the purpose of their investigation to Hairston who had come downstairs to meet them, the Officers asked the other men to come downstairs. Officer Sullivan then told all five men that they were in the process of certain investigation. Afterwards, he called for the other police car that was originally assigned to investigate the complaint.

Officer Sullivan then went upstairs to where the five men had been and discovered the stolen shotgun. When he came downstairs he informed all five men "You are under arrest" (Rec. 8). At this time Jeff Fort said "Bullshit", indicating he was resisting arrest and necessitating Officer Sullivan to grab him. Based on Officer Kovac's testimony, Sullivan's act was reasonable in view of the fact that it seemed as if the other four men were try-

ing to take Jeff Fort from Officer Sullivan's custody (Rec. 16).

Under the statute, a person is guilty of resisting arrest when he knowingly resists, or obstructs, the performance by one known to the person to be a peace officer of any authorized act within his official capacity. Based on Jeff Fort's acts it is obvious that his acts constitute a breach of the statute. As stated in the Ill. Rev. Stat. 1963, Ch. 38, Sec. 7-5 (a) "A peace officer, . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." Counsel argues that swearing does not constitute resistance. However, when surrounded by five men it can safely be argued that the officer's act of immediately grabbing one of five men when he attempted to resist the announced arrest was not unreasonable. The evidence shows that the Officer was doing what he reasonably thought necessary to effectuate a lawful arrest. And, as stated in People v. Lees, 60 Ill. App. 2d 254, Police Officers are entitled to use force reasonably necessary to effect and sustain a lawful arrest and to subdue a person resisting arrest. And, significant, contra to Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551 (1954) counsel makes no claim of injury to the defendant for there was none, Officer Sullivan having used only what force he felt was reasonable to effectuate his arrest.

CONCLUSION

The People of the State of Illinois respectfully request that the conviction of Jeff Fort be affirmed.

Respectfully submitted,

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APPENDIX B

No. 52142

IN THE

APPELLATE COURT OF ILLINOIS

First Judicial District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division. — Honorable Harry G. Comerford, Judge Presiding.

BRIEF AND ARGUMENT OF APPELLANT

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Oral Argument Requested.

IN THE

APPELLATE COURT OF ILLINOIS

First Judicial District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division. — Honorable Harry G. Comerford, Judge Presiding.

NATURE OF THE CASE

The defendant was convicted of resisting arrest in a bench trial on January 10, 1967, before Judge Harry G. Comerford, in the Circuit Court of Cook County, First Municipal Division, and sentenced to serve thirty days in the House of Correction.

DEFENDANT'S THEORY OF THE CASE

The Court should reverse and order the defendant discharged as the State failed to meet its burden of proof because

1. The contradictory and conflicting testimony of the only witness on the question at issue should have been disregarded, or without corroboration, was not entitled to sufficient weight to support the conviction.

Alternatively,

2. The record, based on the State's own case, established self defense and not resistance to the arrest found by the court to have been illegal.

POINTS AND AUTHORITIES

I.

THE TESTIMONY OF THE STATE'S PRINCIPAL WITNESS WAS SELF-CONTRADICTORY, AND CONTRADICTED BY THE OTHER WITNESS FOR THE STATE, AND THE RECORD DOES NOT SUPPORT THE CONVICTION.

Grand Trunk R. Co. v. Hostein, 67 F. 2d 780 (6th Cir., 1933);

Johnston v. Cincinnati N. O. & T. P. Ry. Co., 240 S.W. 429 (Tenn., 1922);

Pritt v. Terminal R.R. Ass'n., 224 S.W. 2d 119 (Mo. 1949);

Cleary, Handbook of Illinois Evidence, Second Ed., 1963.

II.

TAKING THE STATE'S CASE IN ITS BEST LIGHT, THE RECORD SUPPORTS A FINDING THAT DEDEFENDANT WAS JUSTIFIED IN DEFENDING HIMSELF AND NOT THAT HE WAS RESISTING ARREST.

People v. Lees, 60 Ill. App. 2d 254 (1965);

Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551 (1954);

39 American Jurisprudence 503;

Ch. 38, Sec. 31-1, Ill. Rev. Stat., 1965.

STATEMENT OF FACTS

In this case the trial court dismissed charges against defendant and four other boys, and found defendant guilty of resisting arrest. Charges of theft, unlawful use of a weapon, disorderly conduct against the defendant, and charges of theft, unlawful use of a weapon, disorderly conduct and resisting arrest against the other boys were dismissed when the State produced no evidence on the theft, unlawful use of a weapon, and disorderly conduct charges, and for insufficient evidence on the resisting arrest charges (R. 2, 21, 25).

Two Chicago police officers, Sullivan and Kovacs, arrived at 1404 East Marquette Road where they saw the five boys on the porch. When asked to come down, the boys did so (R. 6). Officer Sullivan then went upstairs and returned with a gun (R. 10). (There was no attempt to connect the gun to any of the boys, and no evidence presented on the unlawful use of a weapon charge).

Officer Sullivan testified for the state that when he told the boys that they were under arrest, the defendant swore once at which point the Officer grabbed the defendant and the defendant pushed and hit him (R. 8).

However, in cross-examination, Sullivan contradicted himself by testifying that Fort uttered certain words, swung at him and tried to move away when Sullivan tried to place him under arrest (R. 13). Sullivan also testified that the defendants were arrested on the porch, but later, on direct examination, testified about telling the defendants on the sidewalk that they were under arrest (R. 6, 8). Sullivan did not attempt to explain or reconcile either of these discrepancies.

Neither Sullivan nor Kovacs testified that defendant was told what to do or where to go after he was told he was under arrest.

Kovacs corroborated Sullivan that "(T)he struggle ensued after Officer Sullivan took hold of Jeff Fort" (R. 16). Kovacs testified that afterward there was a scuffle, and that he helped Sullivan handcuff the defendant (R.16).

Officer Kovacs testified that one of the boys, George Rose, tried to take Fort from their custody, and when Kovacs told Rose he was under arrest Rose resisted by pushing the Officer (R. 16, 17).

A motion for acquittal was denied. Defendant testified. He said that he was asked about the gun (R. 22). Following the sequence as related by the defendant, he was first struck and then told that he was going to jail (R. 22, 23).

The trial court found George Rose not guilty and found the defendant guilty of resisting arrest (R. 25, 26). No prior record of any conviction was introduced in aggravation (R. 26).

Solely on Officer Sullivan's testimony and with evidence only that he had previously been before the courts, the court sentenced defendant to thirty days in the House of Correction and commented that he had been very fair to the defendant in many instances (R. 27) without any support for this in the record.

Oral post trial motions in arrest of judgment and for a new trial were denied. Without any showing of a prior record or evidence that defendant would flee the jurisdiction, the Court set an appeal bond at $10,000 (R. 28). Defendant filed this appeal.

ARGUMENT

I.

THE TESTIMONY OF THE STATE'S PRINCIPAL WITNESS WAS SELF-CONTRADICTORY, AND CONTRADICTED BY THE OTHER WITNESS FOR THE STATE, AND THE RECORD DOES NOT SUPPORT THE CONVICTION.

The only testimony that defendant resisted arrest was from Officer Sullivan, but Officer Sullivan contradicted his own testimony on this issue, as well as to when the arrest occurred. Sullivan did not explain the contradiction, and the trial court erroneously selected and relied on one version of Sullivan's testimony without independent corroboration. This action on the part of the Court was mere speculation, and as this testimony proved nothing, the Court should have disregarded Sullivan's testimony, Grand Trunk R. Co. v. Holstein, 67 F. 2d 780 (6th Cir. 1933),

> . . . No jury should be permitted to draw a conclusion from the evidence when the proper conclusion to be drawn lies wholly within the realm of speculation and conjecture.
>
> If the plaintiff presents evidence of and relies upon one set of circumstances, and defendant presents evidence of and relies upon another, there is clearly a conflict of evidence, to be submitted to a jury. But if the evidence of both sets of circumstances is offered by the plaintiff, then we have in substance a situation identical with the one where several inferences may logically be drawn from the same set of circumstances. Under these conditions the jury should not be permitted to guess or speculate which set of circumstances it will accept. This principle has been well expressed

> by Mr. Chief Justice Taft, "when a party with the burden on him introduces evidence consistent with two different states of fact he proves neither."
>
> . . . The first set of circumstances negatives an inference of physical defect; the second can be accounted for upon no other ground. We cannot draw both inferences, but are simply left to speculate as to which should be adopted.

No Illinois case appears where testimony of one witness is self-contradictory. Prior inconsistent statements, if unexplained, are impeaching, Cleary, Handbook of Illinois Evidence, Second Ed. Sec. 9.7; its effect is to impair the credibility of the witness. And both Tennessee and Missouri have concluded that "(I)f proof of a fact lies wholly with one witness and he both affirms and denies it, and there is no explanation, it cannot stand other than unproven." Johnston v. Cincinnati N.O. & T. P. Ry. Co., 240 S.W. 429, 436 (Tenn. 1922). Also see Pritt v. Terminal R.R. Ass'n., 224 S.W. 2d 119, 123 (Mo. 1949).

The rule of rejecting contradictory testimony must be applied a fortiori in criminal cases where the defendant must be proven guilty beyond a reasonable doubt. This rule is clearly applicable where the sole prosecution witness is a police officer — man who is an expert in observing and reporting actions that he is involved in.

Officer Sullivan's testimony should be disregarded. Without that testimony there is no evidence to support the conviction.

II.

TAKING THE STATE'S CASE IN ITS BEST LIGHT, THE RECORD SUPPORTS A FINDING THAT DEDEFENDANT WAS JUSTIFIED IN DEFENDING HIMSELF AND NOT THAT HE WAS RESISTING ARREST.

Officer Kovacs corroborated Officer Sullivan and the defendant: Officer Sullivan grabbed the defendant, without showing that to do so was necessary to effect an arrest. Defendant pushed back once, and had a right to do so to protect himself without resisting arrest.

Officer Kovacs corroborated Sullivan's original testimony, the "struggle ensued after Officer Sullivan took hold of (defendant)" (R. 16). Sullivan testified only that defendant swore once "and I grabbed him, and he pushed me" (R. 10). Swearing once, vague, intemperate language, used without apparent purpose, does not constitute resistance, 39 Am. Jur. 508. However, the officer then grabbed the defendant although the defendant had not resisted the officer in any manner. Police officers are entitled to use force reasonably necessary to effect and sustain a lawful arrest and to subdue a person resisting arrest, People v. Lees, 60 Ill. App. 2d 254 (1965): however, the statute defines resisting arrest as resisting "the performance by . . . a police officer of any authorized act within his official capacity . . ." Ill. Rev. Stat., 1965, Ch. 38, Sec. 31-1, and the officer cannot cause the defendant to resist and then sustain a charge against him. See Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551, 561 (1954) holding that swearing and gestures addressed to a police officer do not amount to a breach of the peace and that it is sworn duty and obligation of the officer not to breach

the peace and beyond this to conduct himself so as to keep others from so doing.

There was no threatening gesture to the officer. The defendant, arrested on charges that would later be dismissed, swore once at the officer, and the officer grabbed him. Yet previously, when the officer asked defendant to come downstairs he had done so. It was the officer's obligation to exercise a great degree of restraint, to avoid any breach of the peace, Oratowski, supra, at 561, yet he allowed defendant's swearing to arouse him, and when he grabbed the defendant without any order, either to follow him into the squad car or do some other act, the defendant had a right to protect himself from an unprovoked attack. The defendant, at that point, was not resisting an unlawful arrest, he was reacting to an unauthorized act of the police officer, and is permitted to do so under the statute. To hold to the contrary would be to violate defendant's right under the Fourth Amendment, and defendant is entitled to discharge.

CONCLUSION

For the reasons set out above defendant requests the Court to reverse the conviction.

Respectfully submitted,

MARSHALL PATNER AND
ALFRED R. LIPTON,
By: ALFRED R. LIPTON.

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APPENDIX C

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	No. ————

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL AND DATE JUDGMENT BECAME FINAL

Defendant, by counsel, petitions this Court for leave to appeal, pursuant to Rule 315 of the Rules of the Supreme Court of Illinois, from an order of the Appellate Court of Illinois, First District, affirming defendant's conviction of resisting arrest under Chapter 38, Sec. 31-1, Ill. Rev. Stat. 1965. The judgment was affirmed by the Appellate Court, 1st District, 3rd Division, on January 18, 1968. No petition for rehearing was filed.

POINTS PLAINTIFFS RELY ON FOR REVERSAL

1. The Appellate Court, First District, Third Division, erred in affirming defendant's conviction of resisting arrest where the only evidence to support proof of the offense beyond a reasonable doubt was the self-contradictory testimony of a single witness, the arresting officer.

2. The Appellate Court, First District, Third Division erred and is in conflict with the opinion in Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551, 561 (First District, Second Division, 1954) by approving an arresting officer's use of force solely in response to defendant's cursing.

FACTS RELEVANT TO APPEAL

The facts relevant to this appeal are not fully stated in the opinion of the Appellate Court. The details of the incident leading to defendant's arrest, as found in the Record on Appeal, are: two policemen, Officers Sullivan and Kovacs, who were investigating the theft of a shotgun, saw defendant and four other youths sitting on an apartment-house porch. The officers did not have a warrant. They called the boys down to the street (R. 6) and one officer went up to the porch where he found a shotgun leaning against the railing. (R. 8) The boys were subsequently charged with theft, unlawful use of weapons, disorderly conduct and resisting arrest. Pending trial bond for the defendant was set at $10,000. At the trial all charges against the five boys were dismissed except for the resisting arrest charge of which only the defendant was convicted.

The only testimony relevant to the charge against defendant was given by Officer Sullivan and his testimony is self-contradictory. He first testified that when he approached the defendant and told him he was under arrest, the defendant swore at him, at which point the officer grabbed the defendant and defendant then pushed and hit him. (R. 8) However, on cross-examination Sullivan altered his testimony and said that he told the defendant he was under arrest, and the defendant then cursed, struck

at Sullivan and attempted to move away, before Sullivan grabbed him. (R. 13) In a second contradiction, Sullivan first testified that the defendants were arrested on the porch, (R. 6) but later testified that the defendants were arrested on the street. (R. 8) The witness did not attempt to explain or reconcile any of the self-contradictions and inconsistencies in his testimony. Yet the Court found defendant guilty of resisting arrest, beyond a reasonable doubt, on the basis of Sullivan's testimony, sentenced him to serve 30 days and over objection continued the bond in the amount of $10,000 for this appeal.

In the Appellate Court opinion affirming the conviction, the Court found contrary to the record that defendant and his four companions were in possession of a stolen shotgun. The Court by relying on this false assumption never reached the question of whether the self-contradictions and inconsistencies in the testimony of the arresting officer prove the defendant guilty beyond a reasonable doubt.

ARGUMENT

I.

WHOLLY UNEXPLAINED INCONSISTANT TESTIMONY BY THE ARRESTING OFFICER IS NOT PROOF BEYOND REASONABLE DOUBT.

Arresting Officer Sullivan provided the sole evidence of defendant's actions which allegedly constituted resisting arrest. As set out above in the statement of facts, he testified to two completely inconsistent sequences of events. Where two witnesses give self-contradictory testimony, Illinois law is clear that the trial court has primary responsibility for determining the credibility to be given each witness and in fact a court can balance the two stories and choose the most likely story on the basis of credibility. However, the central issue raised in the appeal to the Appellate Court and again to this Court is that only one witness testified that the witness was inconsistent on the question at issue, and therefore, the trial court had no reliable or rational way of resolving the inconsistencies in that witness's testimony.

The Appellate Court did not reach this question in affirming and attempted to avoid it by stating that it was unnecessary to determine the sequence of events in the incident leading to the resisting charge. Although this Court has never ruled on the issue, the Supreme Courts of other states have held that in cases of contradictory testimony by a single witness, neither the court nor a jury has a reliable basis to determine credibility and resolve self-contradictory testimony and that consequently all the testimony must be stricken. "If proof of a fact lies wholly with one witness and he both affirms it and denies it, and there is no explanation, it cannot stand other than un-

proven." Johnston v. Cincinnati N.O. and T.P. Ry. Co., 240 S.W. 429, 436, (Tenn. 1922); the policy behind rejection of such inconclusive testimony is clear: the court can only speculate as to the truth of any one part of it. This result is compelling in a criminal case—where the burden of the proof is high.

Sullivan did not attempt to explain the contradiction, and the trial court erroneously selected and relied on one version of Sullivan's testimony without any independent corroboration. This action on the part of the Court was mere speculation; the testimony should have been wholly disregarded. This principle is well set out in Grand Trunk R. Co. v. Holstein, 67 F. 2d 780 (6th Cir. 1933):

> . . . No jury should be permitted to draw a conclusion from the evidence when the proper conclusion to be drawn lies wholly within the realm of speculation and conjecture.
>
> If the plaintiff presents evidence of and relies upon one set of circumstances, and defendant presents evidence of and relies upon another, there is clearly a conflict of evidence, to be submitted to a jury. But if the evidence of both sets of circumstances is offered by the plaintiff, then we have in substance a situation identical with the one where several inferences may logically be drawn from the same set of circumstances. Under these conditions the jury should not be permitted to guess or speculate which set of circumstances it will accept. This principle has been well expressed by Mr. Chief Justice Taft, "when a party with the burden on him introduces evidence consistent with two different states of fact he proves neither."
>
> . . . The first set of circumstances negatives an inference of physical defect; the second can be accounted for upon no other ground. We cannot draw both inferences, but are simply left to speculate as to which should be adopted.

See also Pritt v. Terminal R. R. Ass'n., 244 S.W. 2d 119, 123 (No. 1949).

This evidentiary rule of rejecting self-contradictory testimony of a single witness in the absence of explanation developed in civil cases where the plaintiff only carries a burden of clear and convincing proof. It applies a fortiori in criminal cases where the State's burden is proof beyond a reasonable doubt. In this particular case where the sole prosecution witness to the crucial details of the alleged resistance was a police officer experienced in such incidents and in relating them, the self-contradictory testimony clearly should have been disregarded. It was not entitled to any weight. Without that testimony, there is no evidence to support the conviction.

II.

THE USE OF PHYSICAL FORCE IN MAKING AN ARREST SOLELY BECAUSE OF THE DEFENDANT'S LANGUAGE IS AN UNAUTHORIZED ACT BY AN ARRESTING OFFICER.

By statute, resisting arrest is defined as resisting "the performance by . . . a police officer of any authorized act within his official capacity . . ." Ch. 38, Sec. 31-1, Ill. Rev. Stat. (1965). The record in this case shows that the arresting officer physically grabbed the defendant solely because defendant said 'Bullshit' when arrested, and that the defendant's struggle in reaction to the grabbing resulted in his conviction for resisting arrest. Affirming a conviction of resisting arrest in this case conflicts with the opinion of the Appellate Court, First District, Second Division, Oratowski v. Civil Service Commission, 3 Ill. App. 2d 551, 561, which held that cursing and harsh words

by a defendant do not justify the use of force by arresting officers. "It is the sworn duty and obligation of the officer not to breach the peace and beyond this to conduct himself so as to keep others from so doing." (Oratowski at p. 561)

CONCLUSION

Defendant petitions for leave to appeal to this Court and prays that the judgment of the Appellate Court be reversed.

Respectfully submitted,

Marshall Patner, Alfred R. Lipton,
and Leslie R. Seeligson,
Attorneys for Defendant

By Leslie R. Seeligson

123 West Madison Street
Chicago, Illinois 60602
ST 2-8908

NOTICE AND PROOF OF SERVICE

TO: John Stamos
State's Attorney
Criminal Courts Building
2600 South California
Chicago, Illinois

PLEASE TAKE NOTICE that today this 14th day of March, 1968 I am filing with the Clerk of the Supreme Court of Illinois the attached Petition for Leave to Appeal and am sending you by mail a true copy thereof.

Leslie R. Seeligson

No. 52142

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JEFF FORT, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Division.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendant was charged with the crime of resisting or obstructing a peace officer (Ill. Rev. Stat., ch. 38, §31-1 (1965)) and after a trial by the court he was found guilty and sentenced to serve thirty days in the House of Correction. He appeals and contends that the testimony of the arresting officer should be disregarded as self-contradictory and that in any event he (the defendant) was justified in defending himself. The facts follow.

On June 24, 1966, Officers Sullivan and Kovacs of the Chicago Police Department were assigned to investigate the theft of a shotgun from 1422 East 67th Street, Chicago. After speaking to the victim, they set out to find Jeff Fort and one Gene Hairston who were allegedly involved in the theft. They found Fort, Hairston and three other youths sitting on a front porch at 1404 East Marquette Road, Chicago. They stopped their car in front of the building and were met by Hairston. They told him that they had a charge against him of involvement in the theft. Officer Sullivan directed the other men on the porch to come downstairs and when they did so, he told them of

the nature of the investigation. Sullivan went upstairs, where the five young men had been, and found the stolen shotgun. He came down and informed all five men that they were under arrest. To this, the defendant replied, "Bullshit." That word, slang and vulgar, has a contemptuous and definant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.) The youths were milling around the officers when the defendant directed that abusive, defiant remark to Officer Sullivan. Officer Kovacs testified that it seemed to him they were trying to take Jeff Fort from custody. Sullivan grabbed the defendant, who pushed and struck him. Kovacs testified that he saw the defendant thrashing and kicking and swinging his arms and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers who had been summoned to the scene.

Defendant argues that the police officer was not justified in grabbing him; that the officer's actions amounted to an unprovoked attack; and that under the circumstances he was privileged to repel the attack. In furtherance of this argument he emphasizes some contradictions in the testimony of Officer Sullivan, particularly as to whether the officer seized the defendant before or after being struck by him. It is not necessary that the exact sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest. He admits struggling with the police, and we need only determine whether his physical resistance was in response to an unreasonable exercise of force by the officers.

The Criminal Code provides that:

> "A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified

> in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." (Ill. Rev. Stat., ch. 38, §7-5(a) (1965).)

The arrest occurred in a tense situation. The officers had located a stolen shotgun and undertook to arrest five young men for the offense, when the defendant responded with his abusive and defiant remark. This unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant. Struggling and fighting ensued and four officers were required to restore order.

Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, Ch. 38, §7-7 Ill. Rev. Stat., (1965).) Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed.

The defendant was proven guilty beyond a reasonable doubt and the conviction is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P. J. and SULLIVAN, J. concur.

APPENDIX D

Docket No. 41324—Agenda 29—September, 1968.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. MICHAEL BIRNBAUM, Appellant.

Mr. Justice House delivered the opinion of the court:

The defendant, Michael Birnbaum, was arrested while parading with a placard and passing out pamphlets in front of the Criminal Court Building in Chicago. A complaint was filed charging that the defendant unlawfully resisted the arrest. After a bench trial in the circuit court of Cook County, the defendant was found guilty and fined $100. He now appeals, alleging that the arresting officer acted without authority, that the arrest was therefore unlawful and that his constitutional right to resist an unlawful arrest was violated by the trial court's finding.

On October 24, 1967, Robert Craer, the Chief Deputy Sheriff of the Criminal Court Division, was stationed at the Criminal Court Building in Chicago. About 12 o'clock noon he saw the defendant distributing pamphlets in front of the building. Craer told the defendant that he should move away from the building and not stand in one place. About 1:30 P.M. Craer again saw him on the main sidewalk, stopping people. Craer again told him that he would have to leave. Later that same day, about 2:15 P.M., the defendant was standing in the entrance of the building. Craer called his attention to the rules regarding loitering that were posted inside the building. Subsequently, about 3:30 P.M., Craer asked the defendant whether he had read the rules. The defendant said he had but that they had no meaning for him. Craer then told the defendant that he was being arrested for violating circuit court rule "seven" relating to public loitering and interfering. The defendant resisted the

arrest, but he was subdued by Caer and another police officer.

The defendant argues that the trial court's construction of section 31—1 of the Criminal Code (Ill. Rev. Stat. 1967, chap. 38, par. 31—1) was unconstitutional. It reads: "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institutional other than the penitentiary not to exceed one year, or both." The trial court stated in substance that a person cannot knowingly and forcefully resist an arrest by a police office even if the arrest is unlawful. This statement is suppoted by section 7—7 of the Criminal Code (Ill. Rev. Stat. 1967, chap. 38, par. 7—7) which provides: "A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful."

When Office Craer sought to make the arrest on the steps of the Criminal Court Building, he was acting under the authority of a valid rule of the circuit court. The defendant was told the basis for the arrest and then knowingly resisted. The defendant clearly violated section 31—1.

Although the trial judge stated that even an unauthorized arrest could not be resisted forcefully, this observation is not relevant to the facts of this case or to the decision rendered. The record contains undisputed evidence that the defendant knowingly resisted a lawful arrest, the performance of an authorized act, which makes it unnecessary to decide the constitutionality of section 7—7.

The judgment of the circuit court of Cook County is, accordingly, affirmed.

Judgment affirmed.

APPENDIX E

JOSEPH J. McDONOUGH, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

Court Branch 42, July 8, 19666 Misdemeanor

THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS } SS.
COUNTY OF COOK }

The People of the State of Illinois, Plaintiff,
Jeff Fort, Defendant. } No. 377629

COMPLAINT

Ruby Jones, complainant, now appears before The Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that Jeff Fort has, on or about 24 June 66 at 1522 E. 67th St., committed the offense of theft in that he obtained unauthorized control over the property of Ruby Jones, to-wit a 20 gauge J. C. Higgins shotgun valued under $150, intending to deprive the said Ruby Jones permanently of the use or benefit of said property in violation of Chapter 38, Section 16-1A1, Illinois Revised Statute and against the peace and dignity of the people of the State of Illinois.

Ruby Jones
1522 E. 67th St., 363-9280
Ruby Jones

STATE OF ILLINOIS } SS.
COUNTY OF COOK }

being first duly sworn, on June 24, 1966 oath, deposes and says that she has read the foregoing complaint by her and that the same is true.

Ruby Jones

Subscribed and sworn to before me ....., 19..

Joseph Jim Doyle,

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probably cause for filing same. Leave is given to file complaint. Warrant issued.

Bail Fixed at $10,000

APPENDIX F

PEOPLE v. FORT

91 Ill App2d 212

People of the State of Illinois, Plaintiff-Appellee, v. Jeff Fort, Defendant-Appellant.

Gen No. 52,142.

First District, Third Division.

January 18, 1968.

Obstructing Justice, § 1*—defense of right to defend against officer.

Where burglary suspect used slang and vulgar word having contemptuous and defiant connotation when police officers stated that he and four youthful companions were under arrest, and youths were then milling around officers, making it seem they were trying to take defendant from custody, reasonable cause to believe that force was required to maintain custody existed, and accused, who was subdued, was not entitled to defend charge of resisting or obstructing police officer on ground he was justified in defending himself (Ill. Rev. Stats. 1965, c. 38, § 7-5(a)).

Appeal from the Circuit Court of Cook County, Municipal Division; the Hon. Harry G. Comerford, Judge, presiding. Judgment affirmed.

Marshall Patner and Alfred R. Lipton, of Chicago, for appellant.

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* See Callaghan's Illinois Digest, same topic and section number.

John J. Stamos, State's Attorney of Cook County, of Chicago (Elmer C. Kissane and Barth H. Goldberg, Assistant State's Attorneys, of counsel), for appellee.

MR. JUSTICE SCHWARTZ delivered the opinion of the court.

The defendant was charged with the crime of resisting or obstructing a peace officer (Ill. Rev. Stats., c. 38, § 31-1 (1965)) and after a trial by the court he was found guilty and sentenced to serve thirty days in the House of Correction. He appeals and contends that the testimony of the arresting officer should be disregarded as self-contradictory and that in any event he (the defendant) was justified in defending himself. The facts follow.

On June 24, 1966, Officers Sullivan and Kovacs of the Chicago Police Department were assigned to investigate the theft of a shotgun from 1422 East 67th Street, Chicago. After speaking to the victim, they set out to find Jeff Fort and one Gene Hairston who were allegedly involved in the theft. They found Fort, Hairston and three other youths sitting on a front porch at 1404 East Marquette Road, Chicago. They stopped their car in front of the building and were met by Hairston. They told him that they had a charge against him of involvement in the theft. Officer Sullivan directed the other men on the porch to come downstairs and when they did so, he told them of the nature of the investigation. Sullivan went upstairs, where the five young men had been, and found the stolen shotgun. He came down and informed all five men that they were under arrest. To this, the defendant replied, "Bullshit." That word, slang and vulgar, has a contemptuous and defiant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.)

The youths were milling around the officers when the defendant directed that abusive, defiant remark to Officer Sullivan. Officer Kovacs testified that it seemed to him they were trying to take Jeff Fort from custody. Sullivan grabbed the defendant, who pushed and struck him. Kovacs testified that he saw the defendant thrashing and kicking and swinging his arms and that he was subdued by Officer Sullivan only with his aid and the aid of two other officers who had been summoned to the scene.

Defendant argues that the police officer was not justified in grabbing him; that the officer's actions amounted to an unprovoked attack; and that under the circumstances he was privileged to repel the attack. In furtherance of this argument he emphasizes some contradictions in the testimony of Officer Sullivan, particularly as to whether the officer seized the defendant before or after being struck by him. It is not necessary that the exact sequence of events be conclusively established in order to determine whether the defendant was guilty of resisting arrest. He admits struggling with the police, and we need only determine whether his physical resistance was in response to an unreasonable exercise of force by the officers.

The Criminal Code provides that:

> "A peace officer . . . need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest." (Ill. Rev. Stats., c. 38, § 7-5 (a) (1965).)

The arrest occurred in a tense situation. The officers had located a stolen shotgun and undertook to arrest five

young men for the offense, when the defendant responded with his abusive and defiant remark. This unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant. Struggling and fighting ensued and four officers were required to restore order.

Arrests frequently are made under hazardous conditions and the peace is best preserved when the citizen submits to arrest without regard to the merits of the case. (See, c. 38, § 7-7 Ill. Rev. Stats., (1965).) Our courts have gone to great length to preserve the individual's right to an impartial trial and trial by combat has long been outlawed.

The defendant was proven guilty beyond a reasonable doubt and the conviction is affirmed.

Judgment affirmed.

DEMPSEY, P. J. and SULLIVAN, J., concur.